IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 304 of 1999
with
CRIMINAL APPEAL NO.86 OF 2004

For Approval and Signature:

HON'BLE MR.JUSTICE J.M.PANCHAL
and
HON'BLE MR.JUSTICE M.H.KADRI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

LAXMAN BAPU SONAR

Versus

STATE OF GUJARAT

Appearance:
MS BANNA S DUTTA for the appellants
Mr. B.D. Desai, APP, for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE J.M.PANCHAL
and
HON'BLE MR.JUSTICE M.H.KADRI

Date of decision: 19/01/2004

COMMON ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE J.M.PANCHAL)

1. Both the appeals filed under Section 374(2) of the Code of Criminal Procedure, 1973, are directed against common judgment dated March 16, 1999, rendered by

the learned Additional City Sessions Judge, Court No.18, Ahmedabad, in Sessions Case No. 56 of 1998 and Sessions Case No.57 of 1998, by which, the appellants are convicted of the offence punishable under Section 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act' for short) as well as of the offence punishable under Section 379 read with 114 of the Indian Penal Code, and sentenced to suffer R.I. for ten years and fine of Rs.1 lakh, in default, S.I. for six months for commission of offence punishable under Section 22 of the NDPS Act, as well as R.I. for three years and fine of Rs.3000, in default, S.I. for one month for commission of offences punishable under Section 379 read with 114 of the Indian Penal Code. It may be stated that the learned Additional City Sessions Judge has directed that substantial sentences imposed on the appellants shall run concurrently.

2. As both the Sessions Cases were tried at one trial and disposed of by common judgment dated March 16, 1999, this Court proposes to dispose of both the appeals by this common judgment.

3. In or about October 1997, one Sanjaykumar Ramchandra Shah was residing at village Khavdi and was working with Reliance Company. On October 25, 1997, he had come to Ahmedabad Railway Station from Rajkot for boarding a train for Bihar, which is his native State. He had a suit-case with him, wherein, he had kept Rs.7500, whereas in one of the pockets of his pant, he had kept Rs.2500 and in another a sum of Rs.700. He was sitting in a caravansary located outside the Ahmedabad Railway Station. At that time, one person had approached him and enquired about as to where he was going. Thereupon, Sanjay Shah had replied that he was going to Bihar. The man, who was making enquiry, had told Sanjay Shah that he was going to Mogalsarai. Thereafter, the said person had invited Sanjay Shah to take tea and both of them had taken tea from a nearby stall. After taking tea, the person, who was making enquiry with Sanjay Shah, had asked Sanjay Shah to wait for a while and had come back with biscuits. The person, who was making enquiries, had persuaded Sanjay Shah to eat biscuits. On eating biscuits, Sanjay Shah had lost consciousness. When he had regained consciousness, it was found by him that his suit-case was open and neither in the suitcase nor in his pockets, there was any cash amount. The person, who had given him biscuits to eat, was also not present. Therefore, he had gone to Ahmedabad Railway Police Station for lodging a complaint. At the time when he had gone to lodge the complaint, he was feeling giddy

and, therefore, was sent to the hospital for treatment from the police station. Once he was in complete control of his senses, his complaint was recorded on October 27, 1997. In the complaint, it was mentioned that, when the person making enquiries with him had given biscuits to eat, another person was loitering around and keeping a watch over him. The complaint lodged by Sanjay Shah was registered as C.R. No.I-333 of 1997 for the offences punishable under Sections 328 and 394 of the Indian Penal Code. The complaint lodged by Sanjay Shah was handed over to Police Sub-inspector, Mr. Rana, for investigation.

4. In or about November 1997, one Ketur Pravinchandra Shah was residing at village Vadagam, Taluka Modasa, District Sabarkantha, with his parents, grand-mother, sisters, etc. On November 19, 1997, Ketur Shah along with his parents and grand-mother had come to platform No.1 of Ahmedabad Railway Station from Vadagam, as his parents and grandmother had planned to go to Mathura on a pilgrimage. In all, they had 14 articles with which the parents of Ketur Shah had proposed to travel. When Ketur Shah and others were sitting on the platform, they were approached by Ramesh Narayan Patil, (appellant No.2) and Laxman Bapu Sonar (appellant No.1). The appellant No.2 had put on a safari-suit and boot and was well dressed. After knowing from Ketur Shah that his parents were going to Mathura, the appellant No.2 had informed Ketur Shah and his father that he was also going to Mathura. Thereafter, he had requisitioned tea and given the same for consumption by Ketur Shah and his father. On sipping tea, Ketur Shah and his father had found that it was tasting bitter and therefore they had spilt the tea. In the meanwhile, the train for Mathura had arrived at the platform and, therefore, Ketur Shah and his father had boarded the train for safe placement of their luggage. At that time, Ketur Shah had seen that the appellant No.2 after picking up a bag from the luggage belonging to him and lying on the platform, was running. Therefore, Ketur Shah had raised shouts. It may be mentioned that several police personnel were posted in plain clothes at the Railway Station because of numerous complaints of bag-lifting after intoxicating the passengers. On hearing shouts raised by Ketur Shah, Head Constable Jogindersingh Digpalsingh, who was discharging duties in plain clothes, was alerted and had caught the appellant No.2 with the bag. When the appellant No.2 was running with the bag, the appellant No.1 was also with him. Therefore, Jogindersingh had also apprehended the appellant No.1. The appellants were, thereafter, taken to the Railway Station Police Chowky and presented before

Balkeshwarprasad Avadhabihari Tiwari, who was then Police Inspector of Ahmedabad Railway Police Station. Mr. Tiwari had taken search of the appellants. In the meanwhile, Ketur Shah had come to the Police Chowky and identified his bag, which was of V.I.P. Alfa make, and on which there was a military coloured cloth cover. On opening the bag, it was found that the said bag was containing cash of Rs.2792/- of different denominations and shirts, pants. etc. The person of the appellant No.2 was searched and a sum of Rs.3160 was recovered. During interrogation, the appellant No.2 had disclosed that the cash found from his possession was part of muddamal of C.R. No.I-333 of 1997. As the appellants were arrested red-handed, Ketur Shah had lodged his complaint, which was registered as C.R. No.I-373 of 1997 for commission of offences punishable under Section 379 read with 114 of the Indian Penal Code. On further search of the person of the appellant No. 2, a bunch of keys and a packet containing white powder was found. The powder was such which could be utilised for intoxicating a person. The substance found from the packet was placed in a small plastic bag and the plastic bag was, thereafter, placed in a cotton bag and sealed on which a slip containing signatures of panch witnesses was affixed. The seal of the Police Inspector, Western Railway, Ahmedabad, was also applied. Thereafter, the person of the appellant No.1 was searched and, from one of the pockets of the pant put on by him, a packet was found containing white coloured powder. This powder was also such which could be utilised for intoxicating a person. The incriminating substance found from the possession of the appellant No.1 was also sealed and a detailed panchanama was prepared. Thereafter, offence punishable under Section 20(b) of the NDPS Act was added in the complaint lodged by Ketur Shah. After preparation of the panchanama, the appellants were arrested and were informed about the grounds of the arrest in writing. Further, their family members were also informed about their arrest. As it was revealed that the cash recovered from the possession of the appellant No.2 was part of muddamal of C.R. No.I-333 of 1997, P.I. Mr. Tiwari, had taken over the investigation of C.R. No.I-333 of 1997 and had also arrested the appellants with reference to the said case. The sealed incriminating substances were kept in safe custody and sent to the Forensic Science Laboratory for analysis. Further, Mr. Sanjay Shah, who had lodged the complaint, was also summoned and he had identified the appellant No.2 as the person who had given biscuits to him for eating and the appellant No.1 as the person who was moving around and had kept a watch over him. The Investigating Officer, i.e. P.I.

Mr. Tiwari, had recorded the statements of Head Constable, Joginder Singh, Head Constable, Lalji Bava, Head Constable, Samanda, Police Constable, Arvind Badha, Police Constable, Sunil Banwarilal and others, who were found conversant with the facts of the case and had informed his superior officer about the arrest of the appellants under the provisions of the NDPS Act. The report of analysis indicated that the offending substances recovered from the possession of both the appellants was 'Lorazepam' which is one of the psychotropic substances within the meaning of the NDPS Act.

5. On conclusion of the investigation of C.R. No.I-333 of 1997, the appellants were chargesheeted in the Court of learned Metropolitan Magistrate, Ahmedabad, of the offences punishable under Section 328 and 394 of the Indian Penal Code. As the offence punishable under Section 394 of the Indian Penal Code is exclusively triable by a Court of Sessions, the case was committed to the City Sessions Court, Ahmedabad,for trial, where it was numbered as Sessions Case No.56 of 1998.

6. On conclusion of the investigation of C.R. No.I-373 of 1997, the appellants were chargesheeted in the Court of learned Metropolitan Magistrate, Ahmedabad, of the offence punishable under Section 20 of the NDPS Act as well as offences punishable under Sections 328 and 394 of the Indian Penal Code. As the offence punishable under Section 20 of the NDPS Act,is exclusively triable by a Special Court, the case was committed to the City Sessions Court, Ahmedabad, for trial, where it was numbered as Sessions Case No.57 of 1998.

7. In Sessions Case No.56 of 1998, the learned Judge had framed charge against the appellant No.2 at Exh.1 of the offences punishable under Sections 328 and 379 of the Indian Penal Code, and in the alternative of the offences punishable under Sections 328 and 394 IPC, whereas the appellant No.1 was charged of the offences punishable under Sections 328 and 379 read with 114 of the Indian Penal Code, and, in the alternative, of the offences punishable under Section 328 and 394 read with 114 of the Indian Penal Code. 8. In Sessions Case No. 57 of 1998, the learned Judge had framed charge against the appellants of the offences punishable under Sections 328 and 379 of the Indian Penal Code, and, in the alternative, of the offences punishable under Section 328 and 394 of the Indian Penal Code as well as of offence punishable under Section 22 of the NDPS Act. In both the

Sessions Cases, the charge was read over and explained to the appellants, who had pleaded not guilty to the same and claimed to be tried.

8. The learned Additional Public Prosecutor, conducting Sessions Case No.57 of 1998, had submitted an application at Exh.9 contending, inter alia, that both the Sessions Cases were being posted for hearing on the same dates and both the appellants had committed more offences than one of the same kind within space of one month, and, as the evidence to be led, except that of the complainants, would be the same, both the Sessions Cases should be consolidated and praying the Court to record evidence in Sessions Case No.57 of 1998. It may be noted that the learned advocate, who was appointed to render legal assistance to the appellants, had made an endorsement on Exh.9 mentioning that he had no objection if common evidence was recorded in Sessions Case No.57 of 1998. The learned Judge had heard the learned advocates on Exh.9. The learned Judge was of the view that the facts mentioned in Exh.9 were squarely falling within the provisions of Section 219 of the Code of Criminal Procedure, 1973. Under the circumstance, by an order dated November 10, 1998, the learned Judge had directed that Sessions Case No.56 of 1998 and Sessions Case No.57 of 1998 be tried in one trial and that evidence be recorded in Sessions Case No.57 of 1998.

9. In order to prove its case against the appellants, the prosecution had examined (i) Keturkumar Pravinchandra Shah, P.W.1, at Exh.11, (ii) Jogindersingh Digpalsingh, P.W.2, at Exh.12, (iii) Ayubkhan Abdulkhan Pathan, P.W.3, at Exh.13, (iv) Hasmukhbhai Fogatbhai Vasava, P.W.4, at Exh.15, (v) Jagatsingh Bhupatsingh Rajput, P.W.5, at Exh.21, (vi) Sanjaykumar Ramchandra Shah, P.W.6, at Exh.25, (vii) Vishnubhai Ramchandra, P.W.7, at Exh.26, (viii) Sunilkumar Banvarilal, P.W.8, at Exh.30, and (ix) Balkeshwarprasad Avadhabihari Tiwari, P.W.9, at Exh.32. The prosecution had also produced documentary evidence, such as extracts from station diary at Exh.17, list of articles seized from the appellants at Exh.18, panchanama at Exh.19, report of the PSI, Ahmedabad Railway Police Station to PSO of Ahmedabad Railway Station at Exh.22, complaint of Keturbhai Shah at Exh.33, arrest memo at Exh.34, intimation about arrest of the appellant No.2 to his wife at Exh.35, intimation given about arrest of the appellant No.1 to his mother at Exh.36, forwarding note prepared while sending incriminating articles found from the possession of the appellants to the Forensic Science Laboratory for analysis at Exh.37, report of analysis at Exh.39,

complaint of Sanjay Shah at Exh.40, etc. in support of its case against the appellants.

10. After recording of evidence of prosecution witnesses was over, the learned Judge had explained to the appellants the circumstances appearing against them in the evidence of prosecution witnesses and recorded their further statements as required by Section 313 of the Code of Criminal Procedure.

11. In their further statements, the case of the appellants was that they had not committed any offence as alleged by the prosecution and were innocent. Thereafter, the learned advocates of the parties were heard by the learned Additional City Sessions Judge. However, an application at Exh.48 was submitted by Mr. Parmar, learned advocate of the appellants, requesting the Court to exercise powers under Section 311 of the Code of Criminal Procedure and examine Mr. M.K. Pathak, an expert of Forensic Science Laboratory, as Court witness. That application was allowed by the learned Judge and evidence of Mr. M.K. Pathak, who was then Scientific Officer and Ex-Officio Assistant Chemical Examiner, Government of Gujarat, was recorded as Court witness at Exh.49. The learned advocates of the parties were, thereafter, again heard and, on appreciation of evidence, the learned Judge deduced that it was proved by the prosecution that the appellant No.2 had committed theft of cash belonging to Sanjaykumar Shah as well as bag belonging to Ketur Pravinchandra Shah, whereas the appellant No.1 had abated commission of offence by the appellant No.2 and, therefore, the appellants were liable to be convicted of offence punishable under Section 379 read with 114 IPC. After noticing that this was a chance recovery of a psychotropic substance by P.I. Mr. Tiwari, the learned Judge held that the relevant provisions of the NDPS Act were complied with and, as the appellants were found in possession of the psychotropic substance without pass or permit, they were liable to be convicted of the offence punishable under Section 22 of the NDPS Act. According to the learned Judge, no reliable evidence was adduced to prove the charge against the appellants of the offences punishable under Sections 328 and 394 of the IPC and, therefore, the appellants were entitled to be acquitted of those offences. In view of the abovereferred to conclusions, the learned Judge has convicted the appellants of the offences punishable under Section 22 of the NDPS Act and Section 379 read with 114 IPC and imposed sentences referred to earlier by judgment dated March 16, 1999, giving rise to abovenumbered appeals.

12. Three contentions have been urged by Ms. Banna Dutta, learned advocate of the appellants, for consideration of this Court. The first contention is that the appellants were not accused of more offences than one of same kind in two separate Sessions Cases and, therefore, they could not have been tried at one trial. According to the learned advocate of the appellants, holding of one trial in respect of more offences than one which are not of the same kind has vitiated the conviction of the appellants and, therefore, the appeal should be allowed. The second contention which is raised is that the mandatory provisions of the NDPS Act were not complied with by P.I. Mr. Tiwari and, therefore, the conviction of the appellants of offence punishable under Section 22 of the NDPS Act should be set aside. The third and last contention, which is raised, is that the psychotropic substance found from the possession of the appellants was meant for their personal consumption and, therefore, in view of the provisions of Section 27 of the NDPS Act, the conviction of the appellants under Section 22 of the said Act deserves to be altered to one under Section 27 of the NDPS Act and the appellants having undergone the maximum sentence prescribed under Section 27 of the said Act, appropriate direction should be given to set at liberty the appellants forthwith.

13. Mr. B.D. Desai, learned Additional Public Prosecutor, argued that, in view of the endorsement made by the learned advocate of the appellants that he had no objection if both the Sessions Cases were tried together, the first contention, namely that one trial of offences which are not of same kind has vitiated the judgment should not be accepted by the Court. In the alternative, it was argued that one trial of more offences than one which are not of the same kind has, in fact, not occasioned failure of justice or caused any prejudice to the appellants within the meaning of Section 465 of the Code of Criminal Procedure and, therefore, the plea based on the provisions of Section 219 of the Code of Criminal Procedure, 1973, should be rejected. In answer to the second contention, the learned counsel of the State Government has drawn the attention of the Court to the evidence of the prosecution witnesses as well as the findings recorded by the learned Additional City Sessions Judge and pleaded that as the relevant provisions of the NDPS Act have been complied with, the appellants are not entitled to acquittal on the ground that the provisions of the NDPS Act were not complied with by P.I. Mr.Tiwari. So far as the last contention raised on behalf of the appellants is concerned, it was argued by

the learned APP that onus that psychotropic substance found from the possession of the appellants was meant for their personal use, has not been discharged and, therefore, the plea, which is based on the provisions of Section 27 of the NDPS Act, should not be entertained by the Court.

14. This Court has undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence with reference to broad and reasonable probabilities of the case. While dealing with the first contention advanced on the basis of the provisions of Section 219 of the Code of Criminal Procedure, this Court finds that the learned Additional City Sessions Judge was not justified in coming to the conclusion that the appellants were accused of more offence than one of same kind. It may be stated that, in Sessions Case No.56 of 1998, the case of the prosecution was that the appellant No.2 had committed offences punishable under Sections 328 and 379 IPC or in the alternative under Sections 328 and 394 IPC, whereas, the appellant No.1 had committed offences punishable under Sections 328 and 379 read with Section 114 IPC or in the alternative under Sections 328 and 394 read with Section 114 IPC. In Sessions Case No.57 of 1998, the case of the prosecution was that the appellants had committed offence punishable under Section 22 of the NDPS Act as well as offences punishable under Sections 328 and 379 IPC. The alleged commission of offences punishable under Sections 328 and 379 or Sections 328 and 394 or Sections 328 and 379 read with Section 114 or Sections 328 and 394 read with Section 114 of IPC cannot be regarded as of same kind when the case of the prosecution in Sessions Case No.57 of 1998 was that the appellants had committed offence punishable under Section 22 of the NDPS Act. Under the circumstances, this Court is of the view that the learned Judge was not justified in holding that the facts were squarely covered within the provisions of Section 219 of the Code of Criminal Procedure and, thereafter, trying both the Sessions Cases at one trial. There is no manner of doubt that the order dated November 10,1998, passed below Exh.9 in Sessions Case No.57 of 1998 justifying one trial of offences which are found by this Court not of same kind is erroneous and bad in law. However, the question, which deserves to be considered by the Court,is as to what is the effect of one trial of more offences than one which are not of same kind. In this regard, it would be advantageous to advert to Section 465 of the Code of Criminal Procedure, which reads as under:

"465(1) Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered by a Court of appeal, confirmation or revision on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, or any error, or irregularity in any sanction for the prosecution, unless in the opinion of that Court, a failure of justice has in fact been occasioned thereby.

(2) In determining whether any error, omission or irregularity in any proceedings under this Code, or any error, or irregularity in any sanction for the prosecution has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings."

A bare reading of the above-quoted provisions makes it evident that no error or irregularity during trial should be regarded as sufficient for reversing or altering a finding, sentence or order passed by a Court if error or irregularity has, in fact, not occasioned any failure of justice thereby. Neither it was pleaded before the trial court that one trial of more offences than one which are not of the same kind has occasioned a failure of justice nor it is demonstrated before this appellate Court that one trial of more offences than one which are not of same kind has, in fact, occasioned a failure of justice. It is not the case of the appellants that any special defence which was available to them with reference to Sessions Case No.56 of 1998 could not be taken or pleaded because of one trial of more offences than one of the same kind nor it is pointed out to this Court that the material facts to substantiate their defence could not be established by the appellants with reference to commission of offences alleged in Sessions Case No.56 of 1998 because of one trial of more offences than one which are not of the same kind. Thus, the appellants have failed to establish that one trial of more offences than one which are not of same kind has, in fact, occasioned a failure of justice. Sub-section (2) of Section 465 provides that, while determining whether any error or irregularity in any proceeding under the Code has occasioned a failure of justice, the Court must have regard to the fact whether objection could and should have been raised at an earlier stage in the proceeding.

As observed earlier, no objection was, in fact, raised before the trial court that one trial of more offences than one which are not of the same kind was not permissible or that it would result into failure of justice. In fact, the learned advocate of the appellants had made an endorsement on application Exh.9 mentioning that he had no objection if one trial of more offences than one was held which persuaded the learned Additional City Sessions Judge to hold one trial. On overall view of the matter, this Court is satisfied that the appellants have failed to establish that a failure of justice has, in fact, occasioned because of one trial of more offences than one which are not of the same kind and, therefore, the plea based on breach of Section 219 of the Code of Criminal Procedure cannot be entertained in view of the provision of Section 465 of the Code of Criminal Procedure, 1973. The first contention has, thus, no force and is hereby rejected.

15. So far as the second contention is concerned, this Court finds that this was a case of chance recovery of psychotropic substance from the possession of the appellants by P.I. Mr. Tiwari. It is nobody's case that, on the basis of prior information, persons of the appellants were searched and that psychotropic substance was found from their possession. Under the circumstances, it was not necessary for P.I. Mr. Tiwari to comply with the provisions of Section 50 of the NDPS Act. In Bharatbhai Bhagwanjibhai vs. State of Gujarat, reported in (2002) 8 SCC 327, it was found that there was no prior information to the Police Inspector that the accused was likely to come with a narcotic substance, nor the Inspector had any reason to believe from his personal knowledge or information that the accused was likely to be in the area from where he was found with the contraband item. It was also found that, even at the time of effecting search, there was no knowledge that an offence under the Act had been committed by the accused. In light of these facts, it has been held by the Supreme Court that the provisions of Section 50 of the NDPS Act would not be applicable and that no benefit could be given on the basis that there was breach of the provisions of Section 50 of the NDPS Act. So far as the facts of instant cases are concerned, there is no manner of doubt that the appellant No.2 was caught red-handed at the Ahmedabad Railway Station while he was running with the bag of witness, Ketur Shah, and produced before P.I. Mr. Tiwari. There was no prior information to P.I. Mr. Tiwari that the appellant No.2 or for that purpose the appellant No.1 who was in the company of the appellant No.2 was likely to come with a psychotropic substance nor

the Inspector had any reason to believe from his personal knowledge or information that the appellants were likely to come at the Ahmedabad Railway Station with a contraband item. Under the circumstances, it was not necessary for P.I. Mr. Tiwari to comply with the provisions of Section 50 of the NDPS Act. Therefore, non-compliance of the provisions of Section 50 of the NDPS Act is of little consequence.

16. Section 43 of the NDPS Act gives plenary powers to the Officers to seize in a public place or in transit any narcotic drug or psychotropic substance and to detain and search any person whom he has reason to believe has committed offence punishable under the NDPS Act. The only restriction is that those powers should be exercised by the officer of any Department specified in Section 42. Section 42 enumerates officers of different Departments and includes Police Department. A Police Inspector incharge of the Police Station is empowered to exercise power under Section 42 of the Act. In instant case, Balkeshwarprasad Avadhabihari Tiwari, P.W.9, Exh.32, was Police Inspector incharge of Ahmedabad Railway Police Station. He had exercised powers of search, seizure and arrest. In view of the Division Bench decision of this Court in State of Gujarat vs.Abdul Rashid Ibrahim Mansuri, reported in 1990 (2) G.L.H.398, though it was not necessary for Mr. Tiwari to record in writing grounds of information and to forward such information forthwith to his immediate superior officer, the evidence on record shows that necessary information to his superior officer was forwarded by Mr. Tiwari. Search and seizure in instant case had taken place at the public place and, therefore, the restrictions contemplated by Section 42 would not be applicable to the facts of the case.

17. The record shows that, after seizure of psychotropic substances from possession of the appellants, the same were properly sealed and kept in safe custody before forwarding the same to the Forensic Science Laboratory for analysis. This stands proved from the evidence of police officers who are examined in the case as well as evidence of Ayubkhan Abdulkhan Pathan, P.W.3, recorded at Exh.13, who is an independent panch. The evidence of Hasmukhbhai Fogatbhai Vasava, P.W.4, recorded at Exh.15, establishes that he was Assistant Police Sub-Inspector and was discharging duties as PSO on November 19, 1997 between 11.55 hrs and 19.55 hrs and that contraband item found from the possession of the appellants as well as currency notes, etc. were handed over to him in sealed condition. His evidence further

establishes that he had kept the muddamal in safe custody. He is amply corroborated by documentary evidence such as entries made in the official records maintained at the Police Station. The evidence of Vishnubhai Ramchandra, P.W.7, recorded at Exh.26, shows that he had collected the muddamal from the PSO for forwarding the same to the Forensic Science Laboratory for analysis and that after obtaining the muddamal, he had handed over the same to Head Constable Sunilkumar Banvarilal, on November 19, 1997 for taking the same to the Forensic Science Laboratory. The evidence of Sunilkumar Banvarilal, P.W.8, recorded at Exh.30, proves that he had received sealed packets from Vishnubhai Ramchandra and that he had handed over the same to the Forensic Science Laboratory on November 19, 1997. The report of analysis, which is produced on the record of the case, at Exh.39, shows that the samples were sealed and intact. Thus, psychotropic substances which were found from the possession of the appellants were not only properly sealed and kept in safe custody but had reached intact to the Forensic Science Laboratory.

18. The net result of the above discussion is that it has been established beyond reasonable doubt that all the relevant provisions of the NDPS Act were complied with by the officers concerned and that the contention that there is breach of mandatory provisions of the Act and, therefore, the appellants should be acquitted, cannot be accepted.

19. The last contention that small quantity of psychotropic substance found from the possession of the respective appellants was meant for their personal use and, therefore, the appellants ought to have been convicted of the offences punishable under Section 27 of the NDPS Act, is devoid of merits. It is true that the quantity of psychotropic substances found from the possession of respective appellants was small quantity as defined in Section 27 of the NDPS Act. As per the notification of Ministry of Defence, dated July 16, 1996, 10 grams of 'Lorazepam' is considered to be a small quantity and the quantity found from the possession of each of the appellants was 3.730 grams. Therefore, there is no manner of doubt that each appellant was found in possession of small quantity of psychotropic substance. However, it is well settled that, as per Section 27 of the NDPS Act, onus is on the person from whose possession narcotic drug or psychotropic substance is found to prove that the said quantity was for his personal use. In absence of such a proof, presumption regarding culpable mental state as provided in Section 35 of the NDPS Act

will have to be raised. On examination of further statements of the appellants recorded under Section 313 of the Code of Criminal Procedure as well as line of cross examination adopted by the learned advocate of the appellants, it is evident that it was never the case of any of the appellants that the quantity found was for personal use. The evidence of the Chemical Analysist indicates that 'Lorazepam' is available in tablet form as 'ATEVAN' for the patients suffering from disease of nervous system and that the said drug is a scheduled drug available only on the prescription of a medical practitioner. According to him, the optimum dose of 'ATEVAN' helps bringing sound sleep for such patient as it has the effect on the nervous system. In absence of defence to the effect that quantity found was for personal consumption, the provisions of Section 8 of the NDPS Act would come into play, which, in turn, prohibit possession, use, and consumption of any psychotropic substance except for medical or scientific purpose. Further, the evidence of witness, Sanjay Shah, and witness, Ketur Shah, establishes that the appellants were in conscious possession of 'Lorazepam' which is an intoxicating substance and that possession of the said psychotropic substance by the appellants was to facilitate commission of offence. Misuse of 'Lorazepam' has been enumerated by Mr. M.K. Pathak, who was then Scientific Officer and Ex-Officio Assistant Chemical Examiner, Government of Gujarat. Evidence of Sunilkumar Banvarilal, P.W.8, recorded at Exh.30, shows that he and other police officers were in search of such person whose modus-operandi was to administer intoxicating substance to the passengers in train and take away their luggage. The evidence of P.I. Mr. Tiwari, read with that of witness Sanjay Shah and witness Ketur Shah, establishes that unwholesome substance was administered by the appellants in commission of crime. As the prosecution has proved beyond pale of doubt that the appellants were in conscious possession of psychotropic substance which was to be used in commission of offence, benefit under Section 27 of the NDPS Act cannot be given to the appellants. The plea based on Section 27 of the NDPS Act, therefore, fails and is hereby rejected.

20. Except the abovereferred to three contentions, no other contention was raised by the learned advocate of the appellants for consideration of the Court. Acquittal of the appellants of the offences punishable under Sections 328 and 394 of the Indian Penal Code is not subject matter of challenge before this Court. Conviction of the appellants of the offences punishable under Section 379 read with Section 114 of the Indian Penal Code is not challenged by the learned advocate of

the appellants and, even otherwise, the same is well founded in view of cogent, consistent and reliable evidence of witness, Sanjay Shah, and witness Ketur Shah, who have no grudge against any of the appellants nor reason to involve the appellants falsely.Therefore, the conviction of the appellants of the offences punishable under Section 379 read with Section 114 of the Indian Penal Code will have to be upheld. The net result of the above discussion is that both the appeals lack merits and will have to be dismissed.

21. For the foregoing reasons, the appeals fail and are dismissed. The muddmal be disposed of in terms of directions given by the learned Additional City Sessions Judge in the judgment impugned in the appeals.

(J.M. Panchal, J.)

(M.H. Kadri, J.)

(swamy)